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No. 86-390

IN THE

Supreme Court of the United States

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONUS COMMUNICATIONS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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MOTION FOR LEAVE OF CONUS COMMUNICATIONS TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Conus Communications, by and through its counsel, respectfully moves the Court pursuant to Rule 36.1 of the Supreme Court Rules for leave to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina.

Consent of the petitioner and respondent to file an amicus brief has been requested. The petitioner has given its written consent to Conus Communications; the respondent has not consented.

Conus Communications is a Minnesota limited partnership consisting of more than 45 member stations that use

their mobile uplink vans to transmit live reports and field edited features to their home stations and to other Conus stations. Conus Communications does not limit its activities to a single community or group of communities.

The question that Conus believes is of great importance is whether the media may be liable in the absence of fault for the truthful presentation of facts concerning a person, even facts which a reasonable person might wish to keep private and which are not "newsworthy." The implication of the decision of the South Carolina Supreme Court has a chilling effect on an organization such as Conus Communication which originates news reports outside of South Carolina (and other states which have recognized the particular type of invasion of privacy tort recognized in South Carolina) and which broadcasts/publishes the news report into a state like South Carolina which recognizes the tort. Under these circumstances, if the media can be liable without fault, and if the determination of what is "private" or "newsworthy" is to be done on a community by community basis, then organizations such as Conus Communications will have to refuse to report on stories that may be newsworthy in one community but not in another, or that may be offensive or objectionable in one community, and not in another even though true.

For the foregoing reasons, Conus Communications respectfully requests leave of the Court to file the attached amicus curiae brief in support of the Petition for a Writ of Certiorari to the South Carolina Supreme Court.

Dated: November 7, 1986

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AMICUS CURIAE BRIEF OF CONUS COMMUNICATIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT OF INTEREST

The Amicus Curiae Conus Communications ("Conus") is a Minnesota limited partnership consisting of more than 45 member stations that use their mobile uplink vans to transmit live reports and field edited features to their home stations and to other Conus stations. Petitioner has consented in writing to Conus filing this *amicus* brief; the Respondent has refused to consent.

The question that Conus believes is of great importance is whether the *truthful* presentation of facts concerning a

person, even facts which a reasonable person might wish to keep private and which are not "newsworthy," may give rise to a common-law tort liability for damages on the theory of a public disclosure of a private fact (invasion of privacy) in the absence of some fault, such as the manner in which the facts were gathered or some ulterior motive in their publication. Petitioner could not adequately represent the issue with respect to a publication in many different communities. The implication of the decision of the South Carolina Supreme Court has a chilling effect on any organization originating a news report outside of South Carolina, (or any other state which has recognized the public disclosure of private facts form of invasion of privacy) and which broadcasts/publishes the report in a state like South Carolina that recognizes the public disclosure of private facts tort.

SUMMARY OF ARGUMENT

Before focusing on what this case does involve, it is important to note what this case does not involve. This case does not involve the form of invasion of privacy known as "false light." The Court has addressed the "false light" privacy tort on two earlier occasions: first, in *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) ("We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."); second, in *Cantrell v. Forest City Publishing Company*, 419 U.S. 245, 250-51 (1974) ("Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more

relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases"). Both cases required a finding of fault, that the information put the plaintiff in a "false" light.

Nor does this case involve a question of potential criminal liability for publishing truthful information lawfully obtained like in *Smith v. Daily Mail Publishing Company*, 442 U.S. 97, 104 (1979) ("If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.") The Court cautioned that *Smith* did not involve an issue of privacy or of unlawful press access to confidential judicial proceedings. *Id.* at 105.

Nor does this case involve a defamation about a private party as in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. —, 86 L.Ed.2d 593 (1985).

What this case does involve is the truthful presentation of a fact which a jury found a reasonable person would wish to keep private and was not itself "newsworthy." The scope of and limitation on the public disclosure of a private fact tort have never been addressed by the Court. As the Second Circuit Court of Appeals recently emphasized, "History suggests that individual rights of privacy are actionable when the media portrays an individual falsely, but not otherwise." *Machleder v. Diaz*, — F.2d —, 13 Med.L.Rptr. 1369, 1370 (2nd Cir. 1986). Nevertheless, some states and lower federal courts have imposed liability for truthful presentations of private non-newsworthy facts; other states and lower federal courts have denied recovery under such circumstances.

The two questions that Conus thinks are appropriate for the Court's consideration and which are important to the manner in which a free press gathers and disseminates news are (1) whether a fact has public concern or is newsworthy is a determination to be made as one of law for the Court or, instead, as one of fact for a jury; and (2) should a plaintiff be able to recover from a media defendant for the public disclosure of a private fact without showing some fault by the press. In other words, should the publication be a *per se* violation or should the plaintiff have to show some fault on behalf of the defendant.

I.

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT CONFLICTS WITH THE PRINCIPLES ARTICULATED BY THE COURT AS TO WHETHER THE QUESTION OF "PUBLIC CONCERN" IS A QUESION OF LAW OR OF FACT

Although the Court has not directly addressed the question as to whether the Court or the jury should determine whether a "fact" is a matter of "public concern" in connection with a claim for invasion of privacy, the Court has determined in libel and other cases that it is for the Court both in the first and in the last instance to determine such an issue. In *Rosenblatt v. Baer,* 383 U.S. 75, 88 (1965), the Court held that "as is the case with questions of privileges generally, it is for the Trial Judge in the first instance to determine whether the proofs show respondent to be a 'public official.' " In *Bose Corp. v. Consumer's Union of United States, Inc.,* 466 U.S. 485, 511 (1984), the Court held that "The question whether the evidence in the record of a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'." And finally, the Court in *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983), held that "the inquiry into the protected status of speech is one of law, not fact." Although the Court in *Connick* limited the distinction between public and private concern to the context of government employment (*Id.* at 148, n.8), that limitation does not affect whether the issue is one of fact or law.

The Supreme Court of South Carolina held, on the other hand, that "Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury." Pet. App. 3a. As a result, the South Carolina Supreme Court rejected the analysis and holdings of this Court.

What is "newsworthy" or "private" will likely differ among communities, generations, ethnic, religious and other social groups, as well as among individuals. Editorial judgment as to what is "newsworthy" should not be submittable to review by a jury and, thereby, create "community by community standard." If this were the case, then facts which were broadcast nationally might be "newsworthy" in one community and "private" in another community. This would create a chilling effect on news gathering and news reporting.

In addition, the Court should not substitute its judgment for that of the press by requiring the press to present only the facts that the Court believes appropriate. Effective news reporting involves editing and the editing process necessarily involves professional judgments. What one person finds flattering, another might find obnoxious. Only when the

press so oversteps its editorial freedom should liability attach.

Even the concept of using a "public concern"/"private concern" test has been criticized by the Court. In *Gertz v. Welsh,* 418 U.S. 323, 346 (1974), the Court rejected the plurality approach from *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), doubting the wisdom of committing the task of "conscience" even to a judge. The Court held instead, that it was inappropriate to apply a "general or public interest standard" to a private individual defamation case and opted to allow states to impose liability but only upon a showing of fault. When the "public concern" standard has been applied, there has been virtually no guidance as to what constitutes a protected matter of public concern. *Dun & Bradstreet v. Greenmoss Builders,* 86 L.Ed.2d at 620 (Brennan, J. dissenting).

As a result of the confusion as to whether "public concern" is a question of fact or of law, and whether the "public concern" should even be a test, the petition should be granted so that this Court can resolve the differences between state and lower federal courts and eliminate the uncertainty for all persons gathering and reporting news to both a local and national audience.

II.

THE "FAULTLESS" STANDARD ADOPTED BY THE SOUTH CAROLINA SUPREME COURT IS INCONSISTENT WITH CONSTITUTIONAL PROTECTIONS

The invasion of privacy tort recognized by the Supreme Court of South Carolina is a "faultless" tort. South Carolina has defined the tort as the "publicizing of one's private affairs with which the public has no legitimate concern"

and which is "of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence." *Meetze v. Associated Press,* 230 S.C. 330, 335, 338, 95 S.E.2d 606, 608, 610 (1956). As so defined, the tort necessarily has a head-on collision with First Amendment rights.

Other state supreme courts have required more than just publication and have imposed a fault standard in order to avoid the head-on collision with the First Amendment. For instance, in *Anderson v. Fisher Broadcasting, Inc.,* 300 Ore. 452, 715 P.2d 803 (1986), the Oregon Supreme Court noted that the common law tort based solely on publicizing private facts that are true but not newsworthy has met critical response and that the tort was neither part of the common law of England and, after study, was specifically rejected in England. The Oregon Supreme Court concluded that there could be no liability for the truthful presentation of facts that a reasonable person would wish to keep private and that are not "newsworthy" without a showing that the manner or purpose of defendant's conduct was wrongful in some respect apart from causing the plaintiff's hurt feelings. The Oregon Supreme Court also analyzed the purpose of the tort and emphasized that it singled out the print, film and broadcast media for conduct that would not be applied to gossip-mongers in neighborhood taverns.

A national news gathering and disseminating service can afford to perform its job with maximum impact only by complying with the most restrictive standard in any of the jurisdictions to which its news reports may be carried. If liability can attach for the truthful reporting of "private" facts without the requirement of some fault, or without some

showing that the press substantially overstepped its editorial freedom, national news gathering and disseminating services cannot perform the function of the free press envisioned by the First Amendment drafters. Adopting a standard of "clear and convincing proof" of actual malice would accomplish the delicate balancing which needs to be made between the individual's right of privacy and the freedom of the press. Accordingly, this Court should grant the writ of certiorari to resolve the substantial dispute between state courts and lower federal courts.

CONCLUSION

This case involves a struggle between private rights and freedom of the press guaranteed by the First Amendment. The resolution of the struggle should not be made on a community by community basis; there should be a uniform standard applicable everywhere. For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina.

Dated: November 7, 1986

Respectfully submitted,

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